Supreme Court, U.S.
FILED
SEP 5 2002
CLERK

No. 01-7574

In The Supreme Court of the United States

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITIONER'S REPLY BRIEF

ROBERT BRETT DUNHAM*
Counsel of Record
ANNE L. SAUNDERS*
DEFENDER ASSOCIATION
OF PHILADELPHIA
Capital Habeas Corpus Unit
The Curtis Center,
Suite 545-West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

JOHN T. ADAMS*
LINTON, DISTASIO, ADAMS, &
PALANGE, P.C.
1720 Mineral Spring Road
P.O. Box 461
Reading, PA 19603-0461
(610) 374-7320

Counsel for Petitioner
David Allen Sattazahn

Dated: September 4, 2002
*member of the bar of this Court

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

THIS IS A CAPITAL CASE

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Respondent Admits That Petitioner is Entitled to Double Jeopardy Analysis Under *Bullington v. Missouri*; Under *Bullington*, the Double Jeopardy Clause is Violated Whenever – As Here – a Defendant Who Received a Life Sentence in His Initial Trial-Like Capital Sentencing Proceeding is Subjected to Successive Capital Sentencing Proceedings 1

A. *Bullington*'s Double Jeopardy Rule is "Narrow" Because it Applies Only to Trial-Like Capital Sentencing Proceedings; But With Respect to Those Proceedings, It – and Not the "Clean Slate" Doctrine – Applies Whenever a Defendant Receives a Life Sentence .. 3

B. Respondent's and Amicus's Reliance on Hung Jury Cases is Misplaced; Although Double Jeopardy Protections Do Not Require an Acquittal on the Merits, Petitioner's Life Sentence Was a Determination That He Did Not Deserve the Death Penalty As a Matter of Law and Constituted an Acquittal 8

C. *Ring v. Arizona* Further Supports the *Bullington* Rule that the Imposition of Life Sentence is An Acquittal of the Death Penalty... 13

TABLE OF CONTENTS – Continued

Page

II. Respondent Admits that Petitioner Had a Life and Liberty Interest in the Statutorily Mandated Life Sentence the Trial Court Imposed When the Sentencing Jury in His First Trial Lifelocked; That Interest Necessarily Encompasses An Expectation in the Finality of His Life Sentence 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. Rumsey, 467 U.S. 203 (1984) ..... *passim*

Arizona v. Washington, 434 U.S. 497 (1978) 9

Bullington v. Missouri, 451 U.S. 430 (1981) ..... *passim*

Caspari v. Bohlen, 510 U.S. 383 (1994) 3, 4, 5, 6, 7

Downum v. United States, 372 U.S. 734 (1963) 11

Evitts v. Lucey, 469 U.S. 387 (1985) 18

Fong Foo v. United States, 369 U.S. 141 (1962) 11

Ford v. Wainwright, 477 U.S. 399 (1986) 18

Furman v. Georgia, 408 U.S. 238 (1972) 7

Gori v. United States, 367 U.S. 364 (1961) 11

Green v. United States, 355 U.S. 184 (1957) 14

Hicks v. Oklahoma, 447 U.S. 343 (1980) 15

Jones v. United States, 527 U.S. 373 (1999) 6, 10

Lockhart v. Nelson, 488 U.S. 33 (1988) 3, 4

Monge v. California, 524 U.S. 721 (1998) 3, 4, 5, 6, 14

Ohio Adult Parole Authority v. Woodward, 477 U.S. 272 (1998) 18

Pennsylvania v. Goldhammer, 474 U.S. 28 (1985) 6

Poland v. Arizona, 476 U.S. 147 (1986) 7, 12

Richardson v. United States, 468 U.S. 317 (1984) 9, 10

Ring v. Arizona, 122 S. Ct. 2428 (2002) 13, 14, 18

Sanabria v. United States, 437 U.S. 54 (1978) 10, 11

Schiro v. Farley, 510 U.S. 222 (1994) 5, 7

TABLE OF AUTHORITIES – Continued

Page

Sisson v. United States, 399 U.S. 267 (1970) 11

Smalis v. Pennsylvania, 476 U.S. 140 (1986).....7, 11

Spaziano v. Florida, 468 U.S. 447 (1984).....4, 6

Strickland v. Washington, 466 U.S. 668 (1984)..... 6

Stroud v. United States, 251 U.S. 15 (1919).....2, 5, 7, 8

United States v. DiFrancesco, 449 U.S. 117 (1980) 6, 18

United States v. Jorn, 400 U.S. 470 (1971) 10, 11

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).....11

United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).....8, 10

STATE CASES

Commonwealth v. Martorano, 535 Pa. 178, 634 A.2d 1063 (1993)..... 1

Commonwealth v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2002)..... 1

State ex rel. Westfall v. Mason, 594 S.W.2d 9008 (Mo. 1980).....12

STATE STATUTES

42 Pa. C.S. § 9711(c)(1)(iv).....17

42 Pa. C.S. § 9711(c)(1)(v).....12, 17

42 Pa. C.S. § 9711(f).....17

42 Pa. C.S. § 9711(g) 16, 17

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Acker & Lanier, *Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform*, 32 CRIM. L. BULL. 134, 169 (1996) 6, 9

Caspari v. Bohlen, 1993 WL 757639 (December 6, 1993) (oral argument) 3, 5

Monge v. California, 1998 WL 222955, 48-49 (April 28, 1998) (oral argument) 3

ARGUMENT

I. Respondent Admits That Petitioner is Entitled to Double Jeopardy Analysis Under *Bullington v. Missouri*; Under *Bullington*, the Double Jeopardy Clause is Violated Whenever – As Here – a Defendant Who Received a Life Sentence in His Initial Trial-Like Capital Sentencing Proceeding is Subjected to Successive Capital Sentencing Proceedings.

Respondent concedes "that the capital sentencing procedure in Pennsylvania resembles a trial for double jeopardy purposes, just as the Missouri and Arizona sentencing proceedings in *Bullington* and *Rumsey*, and that the procedure, therefore, triggers the need to determine if protection is available under the Double Jeopardy Clause." *Respondent's Brief* at 13. This concession is dispositive because the imposition of a life sentence after a capital sentencing proceeding that bears "the hallmarks of [a] trial on guilt or innocence," *Bullington v. Missouri*, 451 U.S. 430, 439 (1981), triggers the protections of the Double Jeopardy Clause.[1] The life sentence imposed after the completed capital sentencing hearing in this case is a judgment[2] like the sentences at issue in *Bullington* and

---

[1] *See Initial Brief* at 19-23; *Arizona v. Rumsey*, 467 U.S. 203, 210 (1984) ("In short, a sentence imposed after a completed Arizona capital sentencing hearing is a judgment like the sentence at issue in *Bullington v. Missouri*, which this Court held triggers the protections of the Double Jeopardy Clause.").

[2] *See Commonwealth v. Sattazahn*, 563 Pa. 533, 548, 763 A.2d 359, 367 (2000), J.A. at 103 (describing the life sentence imposed in this case as a statutorily mandated "default judgment"); *Commonwealth v. Martorano*, 535 Pa. 178, 194, 634 A.2d 1063, 1070 (1993); *see also*

(Continued on following page)

Rumsey, and so subjecting Petitioner to the death penalty on his retrial violated double jeopardy.

Respondent and Amicus, the United States of America, try to avoid this straightforward application of *Bullington* by labeling *Bullington* a "narrow" rule and invoking two inapplicable lines of continuing jeopardy cases: the "clean slate" doctrine of *Stroud v. United States*, 251 U.S. 15 (1919), permitting retrial of a defendant who overturns his conviction, including potentially harsher resentencing of that defendant, depending upon the nature of the applicable sentence and of the original sentencing proceedings;[3] and a line of cases permitting retrial when a hung jury creates manifest necessity for a mistrial that prevents the entry of a judgment of verdict or sentence.

As set forth below and throughout Petitioner's *Initial Brief*, Respondent's and Amicus's conclusion and the premises from which it arises have no basis in *Bullington* or any other double jeopardy decision of this Court that applies to trial-like capital sentencing proceedings concluded in a defendant's favor.

Amicus Brief at 17 ("the trial court entered judgment after discharging a deadlocked jury").

[3] Whenever the original sentencing proceedings do not provide trial-like protections, the prosecution may seek any statutorily prescribed sentence on retrial. When the original sentencing proceedings were trial-like, however, the State may seek a harsher punishment only when those initial proceedings were non-capital in nature.

A. *Bullington*'s Double Jeopardy Rule is "Narrow" Because it Applies Only to Trial-Like Capital Sentencing Proceedings; But With Respect to Those Proceedings, It – and Not the "Clean Slate" Doctrine – Applies Whenever a Defendant Receives a Life Sentence.

The United States asserts that "[l]ater decisions make clear that Bullington established a 'narrow exception'" to the general rule that a defendant who overturns his conviction on appeal faces a "clean slate" in which he may, if reconvicted, face a harsher sentence. *Amicus Brief* at 13 (quoting *Monge v. California*, 524 U.S. 721, 730 (1998)).

What these later decisions actually make clear – including the case the United States cites – is that *Bullington*'s "narrowness" arises out of its inapplicability to non-capital cases, not any limited application within capital cases. *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988) (declining to reach question of whether to *expand Bullington* to non-capital sentencing proceedings); *Caspari v. Bohlen*, 510 U.S. 383 (1994) (holding that extending *Bullington* to non-capital sentencing proceedings would constitute new rule of law); *Monge v. California*, 524 U.S. 721, 726 (1998) (declining to extend *Bullington* to non-capital sentencing proceedings).[4]

---

[4] Indeed, this is precisely what the United States has argued to this Court in prior double jeopardy cases. *See Monge v. California*, 1998 WL 222955, *48-*49 (April 28, 1998) (oral argument of Amicus Curiae, the United States of America); *Caspari v. Bohlen*, 1993 WL 757639, *19 (December 6, 1993) (oral argument of Amicus Curiae, the United States of America) ("Our position is that Bullington ought not to be extended

(Continued on following page)

As to capital cases, however, *Bullington* applies precisely as Petitioner has described. *Caspari*, 510 U.S. at 386 (O'Connor, J., for eight Justices)[5] ("In *Bullington v. Missouri*, 451 U.S. 430 (1981), we held that a defendant sentenced to life imprisonment following a trial-like capital sentencing proceeding is protected by the Double Jeopardy Clause against imposition of the death penalty if he obtains reversal of his conviction and is retried and reconvicted."); *see Monge*, 524 U.S. at 726 ("In *Bullington*, we held that a capital defendant who had received a life sentence during a penalty phase that bore 'the hallmarks of [a] trial on guilt or innocence' could not be resentenced to death upon retrial following appeal."); *Lockhart*, 488 U.S. at 37 n.6 (describing *Bullington* as "the rule that the Double Jeopardy Clause limits the State's power to subject a defendant to successive capital sentencing proceedings"); *Spaziano v. Florida*, 468 U.S. 447, 458 (1984) ("the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty").

In the words of the United States to this Court:

> [T]he rationale of *Bullington* was that because there was this full trial-like process and because it was a question of life or death, an up-down, yes-no question, then the Court was willing to

outside the capital context; i.e. the context where life or death determinations are made after a full trial-like process.").

[5] Justice Stevens dissented not because he disagreed with the Court's articulation of the *Bullington* holding, but because he would have extended *Bullington* to trial-like *non-capital* sentencing proceedings. *Caspari*, 510 U.S. at 397-98.

> treat the outcome of that proceeding as though it were a verdict on the question of life or death, i.e. innocent or guilty.
>
> That analysis stands alone in this Court's sentencing cases relating to double jeopardy. . . . [T]he context in which it arose [was] where there was a full trial-like procedure with an ultimate determination of life or death.

Caspari v. Bohlen, 1993 WL 757639, at *21-*22; *see also id.* at *19 (Bullington applies in "the capital context; i.e. the context where life or death determinations are made after a full trial-like process").[6]

The Double Jeopardy Clause applies to life sentences imposed in modern trial-like capital sentencing proceedings because, under the Eighth Amendment, the unique severity and finality of the death penalty requires heightened procedural safeguards to assure the accuracy and

[6] Contrary to Respondent's misapprehension, *see Respondent's Brief* at 23-24, Petitioner has never argued that the imposition of a life sentence in *any* capital trial invariably triggers double jeopardy protections. *See, e.g., Stroud v. United States*, 251 U.S. 15 (1919) (non-trial like sentencing). It is *the combination* of the facts that death is a categorically different type of sentence than any other and that the trial-like nature of the sentencing proceedings in *Bullington*, *Rumsey*, and this case are unlike typical sentencing proceedings. *Monge v. California*, 524 U.S. at 733 ("*Bullington* turns on *both* the trial-like proceedings at issue and the severity of the penalty at stake."); *Caspari v. Bohlen*, 510 U.S. at 392 ("Both *Bullington* and *Rumsey* were capital cases, and our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding."); *Schiro v. Farley*, 510 U.S. 222, 231 (1994) ("[b]ecause the capital sentencing proceeding 'was itself a trial on the issue of punishment,' requiring a defendant to submit to a second, identical proceeding was tantamount to permitting a second prosecution of an acquitted defendant'" (quoting *Bullington*, 451 U.S. at 446).

reliability of the sentence ultimately imposed, and a sentencing proceeding that bears "the hallmarks of [a] trial on guilt or innocence," *Bullington*, 451 U.S. at 439, is one such safeguard. Thus, "the nature and the consequences of capital sentencing proceedings are intertwined," and "*Bullington* [is] an example of the heightened procedural protections accorded capital defendants." *Monge*, 524 U.S. at 733, 734; *cf. Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Spaziano*, 468 U.S. at 458.

Indeed, the implications of these safeguards have been a principal basis upon which this Court has repeatedly distinguished life sentences returned after a capital penalty-phase trial from sentences in non-capital cases.[7] "[T]he decisions of this Court 'clearly establish that a sentenc[ing *in a noncapital case*] does not have the qualities of constitutional finality that attend an acquittal.'" *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (per curiam) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980)), *quoted in Caspari*, 510 U.S. at 392

[7] Because heightened safeguards against the erroneous imposition of a death sentence are a significant part of the reason that the Double Jeopardy Clause applies in capital sentencing proceedings, it would be illogical and unreasonable to then withhold double jeopardy protection when the defendant's life sentence is the product of a safeguard – jury lifelock – that has been adopted by most death penalty jurisdictions. *See Jones v. United States*, 527 U.S. 373, 419 (1999) (Ginsburg, J., dissenting) (citing Acker & Lanier, *Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform*, 32 CRIM. L. BULL. 134, 169 (1996) ("In twenty-five of the twenty-nine states in which capital juries have final sentencing authority, . . . a deadlocked sentencing jury is transformed into a 'lifelocked' jury. That is, the jury's inability to produce a unanimous penalty-phase verdict results in the defendant's being sentenced to life imprisonment or life imprisonment without parole.").

(bracketed phrase added by the *Goldhammer* Court; emphasis in *Caspari*). But *because* death is different; *because* "the sentencing procedures for capital cases instituted after the decision in *Furman* [*v. Georgia*, 408 U.S. 238 (1972),] are unique," *Bullington*, 451 U.S. at 441 n.15; and *because* that uniqueness encompasses the heightened procedural requirements of a trial-like proceeding, the imposition of a life sentence at the conclusion of the penalty trial carries with it a procedural finality that is constitutionally significant.

Simply put, this Court has repeatedly stated that a "refusal to impose the death penalty operate[s] as an acquittal of that punishment." *Caspari*, 510 U.S. at 392; *see also Initial Brief* at 22-23, 25-29 (citing *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Poland v. Arizona*, 476 U.S. 147, 152 (1986); *Smalis v. Pennsylvania*, 476 U.S. 140, 145 n.8 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981)).

The rule in *Bullington* applies to all life sentences imposed after completion of capital sentencing proceedings that bear the hallmarks of a trial. It does not parsimoniously evaluate how a life sentence was imposed as a precondition for granting double jeopardy protection. The entire thrust of *Bullington* is that *Stroud v. United States*, 251 U.S. 15 (1919), and its "clean slate" rule do not apply to capital sentencing proceedings that bear those hallmarks.[8] *Bullington*, 451 U.S. at 432-35; *Arizona v. Rumsey*,

[8] In *Stroud*'s case, the applicable sentencing statute stated that: "Every person guilty of murder in the first degree shall suffer death," but "the jury may qualify their verdict by adding thereto 'without

(Continued on following page)

467 U.S. 203, 209-11 (1984). Amicus acknowledges that "changes in this Court's capital jurisprudence have limited Stroud's application." *Amicus Brief* at 11. As the previous discussion demonstrates, that "limitation" is in fact an abrogation.

Respondent concedes, and the Amicus does not dispute, that Pennsylvania's capital sentencing scheme is materially indistinguishable from those of Missouri and Arizona, which trigger double jeopardy protections. For all the same reasons, this case is distinguishable from *Stroud*. When a defendant who has been subjected to an initial trial-like capital sentencing proceeding and emerged with a life sentence later obtains reversal of his conviction and is retried and reconvicted, *Bullington* applies and *Stroud* has no application.

B. Respondent's and Amicus's Reliance on Hung Jury Cases is Misplaced; Although Double Jeopardy Protections Do Not Require an Acquittal on the Merits, Petitioner's Life Sentence Was a Determination That He Did Not Deserve the Death Penalty As a Matter of Law and Constituted an Acquittal.

Respondent and the United States also erroneously rely on *United States v. Perez*, 22 U.S. (9 Wheat.) 579

---

capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." *See Bullington*, 451 U.S. at 439 n.11. The juries in the trials of the famous Birdman of Alcatraz were given no further guidance as to how to determine the appropriate penalty. *Id.*

(1824), and its line of mistrial cases to argue that Petitioner's life sentence – imposed as a matter of law when the jury deadlocked 9-3 in favor of life – is not an acquittal barring retrial under the Double Jeopardy Clause. *Respondent's Brief* at 7, 21, 23; *Amicus Brief* at 16. Respondent notes that jury non-unanimity has "traditionally resulted in a hung jury at a trial," at 21, and quoting *Richardson v. United States*, 468 U.S. 317, 325 (1984), that "the failure of a jury to reach a verdict is not an event which terminates jeopardy." However, Respondents and Amicus overlook a central point in all these cases: the jury deadlock resulted in *mistrials* that prevented the cases from reaching completion.

Yet, under Pennsylvania's capital sentencing statute, jury deadlock does *not* produce the "traditional" mistrial. Instead, by operation of law, "a deadlocked sentencing jury is transformed into a 'lifelocked' jury" that produces a final sentencing judgment. Acker & Lanier, *Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform*, 32 CRIM. L. BULL. 134, 169 (1996). The resulting life sentence is a final judgment – an acquittal of death – which is an event that terminates jeopardy.

Even the mistrial cases acknowledge that when "the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978). Where a trial or trial-like capital sentencing proceeding "terminates with a judgment of acquittal . . . 'double jeopardy principles governing the permissibility of retrial after a declaration of mistrial' have

no bearing." *Sanabria v. United States*, 437 U.S. 54 (1978).[9]

Respondent's and Amicus's argument that Petitioner must demonstrate that he was "acquitted on the merits" or his life sentence is not protected by the Double Jeopardy Clause, *Respondent's Brief* at 7, 11, 16-17, 26; *Amicus Brief* at 12-20, is a non-starter. There is simply no difference for double jeopardy purposes between an "acquittal on the merits" as contemplated by Respondent and the Amicus and an "acquittal-by-operation-of-law" such as occurs when a statute (such as Pennsylvania's) prescribes that the legal consequences of jury disagreement is the imposition of a life sentence.

Moreover, actual acquittal on the merits has never been the sole prerequisite for double jeopardy protections. Jeopardy is terminated and retrial barred "where the first trial had terminated in a manner favorable to the defendant because of jury verdict or because of judicial action." *United States v. Jorn*, 400 U.S. 470, 475 (1971). This includes *any* acquittal, no matter how 'egregious' or

[9] Moreover, a mistrial bars retrial only if there is manifest necessity for halting the trial. *Richardson*, 468 U.S. at 323-24 (quoting *Perez*, 9 Wheat. at 580). This Court has unanimously held that when Congress has anticipated the possibility of jury deadlock and nonetheless provided for imposition of a life sentence by operation of law, the lack of juror unanimity does not create "good cause" to discharge the jury and impanel a new one. *Jones v. United States*, 527 U.S. 373, 381 (1999); *id.* at 418 (Ginsburg, J., dissenting). Although *Jones* involved statutory construction, it is hard to imagine how an act that provides no good cause to impanel a new jury can at the same time constitute manifest necessity for a mistrial.

erroneous;[10] judicial actions that are the functional equivalent of an acquittal;[11] and the premature termination of the proceedings without manifest necessity.[12]

In addition, while insufficiency of the evidence *requires* acquittal – hence this standard of acquittal for cases in which convictions are overturned on appeal – the State's failure to meet the burden of production, *Respondent's Brief* at 24, 26, has never been a necessary prerequisite to the attachment of double jeopardy.[13] A factfinder

[10] *E.g.*, *Sanabria v. United States*, 437 U.S. 54, 68-69, 75 (1978) (retrial barred where an "erroneous evidentiary ruling" that improperly excluded admissible evidence "led to an acquittal for insufficient evidence"); *Fong Foo v. United States*, 369 U.S. 141, 142-43 (1962) (per curiam) (retrial barred following the district court's erroneous direction to the jury to return verdicts of acquittal based upon a combination of perceived prosecutorial misconduct and the lack of credibility of the prosecution witnesses).

[11] *E.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (demurrer at close of prosecution's case, even if erroneously granted); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) (directed verdict following discharge of hung jury); *Sisson v. United States*, 399 U.S. 267, 290 n.19 (1970) (judicially directed verdict of acquittal after court made "legal determination on the basis of facts adduced at the trial relating to the general issue of the case").

[12] *E.g.*, *Jorn*, 400 U.S. at 486 (jury discharged for "lack of preparedness by the Government to continue the trial"); *Downum v. United States*, 372 U.S. 734, 737-38 (1963) (jury discharged when prosecution witness essential to 2 of 6 counts had not been served with summons); *Gori v. United States*, 367 U.S. 364 (1961) (double jeopardy would bar discharge of jury "to help the prosecution, at a trial in which its case was going badly, by affording it another, more favorable opportunity to convict").

[13] Indeed, if it were, this Court could not have granted relief in either *Bullington* or *Rumsey*, in which the State in fact met its burden of production. The state court necessarily found that the evidence presented at Robert Bullington's first trial was sufficient to prove aggravating circumstances, for it would have permitted capital

(Continued on following page)

or capital sentencer may – and sometimes *must* – enter judgment in a defendant's behalf despite evidence sufficient to convict beyond a reasonable doubt.[14] Indeed, the language and logic of *Bullington* and *Rumsey* extend to all cases in which the sentencer has rejected the prosecution's case for death after a trial-like capital sentencing phase. *Poland*, 476 U.S. at 153 n.3 ("The analogy drawn was between a death sentence and a verdict of guilty, a life sentence and a verdict of innocent."). That rejection may or *may not* be based on a failure of proof with respect to some necessary precondition for a death sentence. Either way, double jeopardy applies.[15]

---

resentencing on retrial although Missouri intended to present the exact same evidence it had presented in his first trial. *State ex rel. Westfall v. Mason*, 594 S.W.2d 9008, 925 (Mo. 1980) (Seiler, J., dissenting). And in *Rumsey*, the trial court erroneously rejected evidence that was sufficient to impose death.

[14] This can run the gamut from disbelieving the State's evidence or witnesses to jury nullification. In addition, state law may require acquittal for the failure to meet a higher burden of proof than constitutionally required; to meet a threshold burden of persuasion; or in any number of other possible scenarios in which the law directs the court or the jury to terminate the proceedings in the defendant's favor.

[15] Respondent also argues that the statutorily directed verdict of life is not an acquittal under *Bullington* and *Rumsey* because only "a decision by a jury, or by an appellate court, that the prosecution had failed to prove its case" can prevent a death-after-life capital resentencing, "[t]he trial court was not a decisionmaker at all, but rather an administrator of a statutorily compelled life sentence [and n]o findings of any kind were made, let alone findings sufficient to establish any legal entitlement to a life sentence." *Respondent's Brief* at 10, 21. As discussed more fully in the *Initial Brief* at 27-28, Pennsylvania's statute sets forth specific facts the trial court must find to establish legal entitlement to a life sentence. 42 Pa. C.S. § 9711(c)(1)(v). In any event, the trial court expressly "found" facts, N.T. 5/10/91, at 63, J.A. at 23, that established the Commonwealth's failure to prove its case for death as a matter of law.

Here, the trial court's finding that the sentencing jury could not reach unanimity was a determination as a matter of state law that the State had not sufficiently proven its case for death. That rejection of the State's case was "an acquittal on the merits"; the imposition of a life sentence in a trial-like capital sentencing proceeding was an "acquittal" of death; and whether or not the statutorily mandated life sentence is denominated an "acquittal," it was a final judgment that terminated Petitioner's jeopardy of death and triggered the protections of the Double Jeopardy Clause.

C. *Ring v. Arizona* Further Supports the *Bullington* Rule that the Imposition of Life Sentence is An Acquittal of the Death Penalty.

This Court decided *Ring v. Arizona*, 122 S. Ct. 2428 (2002), after Petitioner filed his *Initial Brief*. Petitioner disagrees with the Amicus's assertion that "Ring has no bearing" on this case. *Amicus Brief* at 14 n.5. True enough, *Ring* is not *necessary* to establish *Bullington*'s rule that, because death is constitutionally different, a life sentence imposed at the conclusion of a trial-like capital sentencing proceeding is an acquittal of the death penalty. Nonetheless, *Ring* confirms and *strengthens* that result.

Pennsylvania's statutory requirement of proving at least one aggravating circumstance before Petitioner could be death-eligible "[i]n effect . . . exposed [him] to a greater punishment than that authorized by the guilty verdict" alone. *Ring*, 122 S. Ct. at 2440. Consequently, Pennsylvania's first-degree murder statute can be said to "authorize[ ] a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision

requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* (citation omitted). Thus, "whether the [sentencing] statute calls them elements of the offense, sentencing factors, or Mary Jane," *id.* at 2444 (Scalia, J., concurring), Pennsylvania's aggravating circumstances are "the functional equivalent of an element of a greater offense" – i.e., capital murder. *Id.* at 2443 (majority opinion).

That the sentencing determination is the functional equivalent of a greater offense necessarily entails that the crime of first-degree murder is a different, lesser offense. It also signals that the jeopardy of life a defendant faces in the trial-like penalty phase of a capital proceeding is separate and independent of the jeopardy of liberty he faced in the guilt phase. This stand-alone jeopardy, in turn, distinguishes these trial-like sentencing proceedings from traditional sentences that "do not place a defendant in jeopardy for an 'offense.'" *Monge v. California*, 524 U.S. 721, 728 (1998); *id.* at 729.

Since "capital murder" is a greater offense than first-degree murder, a final adjudication of life – by whatever means – is an acquittal of that offense. And if, as here, the stand-alone penalty-phase jeopardy has been terminated by a life verdict that cannot be appealed, the status of that acquittal cannot be affected by the outcome of an appeal of a different offense as to which the defendant faces continuing jeopardy. *Green v. United States*, 355 U.S. 184, 190-91 (1957). Thus, *Ring* enhances Petitioner's argument that when a statute has *Bullington*-style procedures for adjudicating the State's case for death, a favorable sentencing-phase decision on life or death is equivalent to an acquittal of death.

II. Respondent Admits that Petitioner Had a Life and Liberty Interest in the Statutorily Mandated Life Sentence the Trial Court Imposed When the Sentencing Jury in His First Trial Lifelocked; That Interest Necessarily Encompasses An Expectation in the Finality of His Life Sentence.[16]

Respondent concedes that

> When a state provides for a jury to impose criminal punishment, the defendant has "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Hicks v. Oklahoma*, 447 U.S. at 346.

Respondent's Brief at 40. It further agrees "that, at the time the jury is deadlocked, the [Pennsylvania capital sentencing] statute creates in the defendant a life and liberty interest in the imposition of a life sentence."-*Id.* at 38.

Respondent's concession that Pennsylvania's statute vested in Petitioner *some form* of life and liberty interest significantly narrows the issue before this Court. The sole issue now is the scope of that interest. Respondent argues that Petitioner's life and liberty interest in the statutorily mandatory directed life verdict resulting from the jury

---

[16] The Amicus, United States of America, addresses a materially different due process question in its brief than the due process "life and liberty interest" question for which Petitioner sought and this Court granted certiorari. The Amicus's reformulation poses a due process issue that Petitioner did not raise in this Court, did not ask this Court to consider, and which Petitioner has not briefed. Petitioner's reply limits itself to the due process life and liberty interest issue actually before the Court.

lifelock is not "immutable" and "does not survive the vacation of the original life sentence." *Id.* at 30, 32.[17]

Petitioner's "substantial and legitimate expectation" in the life sentence he received in his first capital sentencing proceeding was not (as Respondent suggests) "only" in the "ministerial act" of having a life sentence imposed, *id.* at 40;[18] it was in the enforcement and finality of that sentence. That expectation is the same whether the ultimate decision-maker is the jury or the judge and whether the sentence is imposed by operation of law as a result of a unanimous jury verdict or by operation of law as a consequence of jury lifelock. As described in the *Initial Brief* (at 35-37), both outcomes are an integral part

[17] Respondent also concedes that Petitioner "has a liberty interest in the jury's being informed of all the sentences which it can impose," but suggests that there was no violation of Petitioner's life and liberty interest in this case because "Sattazahn's jury was informed that it could by unanimous agreement sentence him to life imprisonment or death." *Respondent's Brief* at 40. This argument, however, misses the point. Petitioner is not arguing that the life sentence he received in his first trial violated his life and liberty interest in a jury verdict based on the proper exercise of its statutory discretion. While Petitioner agrees with Respondent that such a life and liberty interest exists, its contours are not at issue in this case. What is at issue here is the enforcement in his second trial of his life and liberty interest in the *judicially directed verdict* of life that was properly imposed in the first trial.

[18] Contrary to Respondent's suggestion, the judge performs the same "ministerial act" when the jury reaches a unanimous life verdict. 42 Pa. C.S. § 9711(g) ("Recording sentencing verdict. – Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury."), and Respondent surely would not contend that the expectations of a defendant who received a life sentence from the jury would be limited to having the court formally pronounce and impose that sentence.

of the Commonwealth's system of finally adjudicating life or death, and both are statutorily mandated.[19]

In addition, trial-like capital sentencing proceedings have "qualities of constitutional finality" not present in non-capital cases. *See supra* at 6-7. The defendant in such proceedings has a substantial and legitimate expectation that, if a lifelocked jury produces a mandatory life sentence, he will be deprived only of his liberty and not of his life.

Further, Respondent's assertion that Petitioner's expectation of finality "does not survive the vacation of the original life sentence" is both unfounded and a misnomer. Petitioner did not vacate his life sentence; he overturned his conviction.[20] Moreover, he did not and Pennsylvania as a matter of law *could not* appeal his life sentence. *Initial Brief* at 36-37. With nothing to be vacated, there was no intervening act for the life sentence to survive. Instead, the statutory unavailability of appellate review of a life

[19] There is no support for Respondent's argument that the Pennsylvania sentencing statute treats life sentences differently depending upon whether they are the product of a unanimous jury verdict or a statutorily directed judicial verdict. The sole substantive reference to life verdicts in Pennsylvania's sentencing statute does not distinguish between the two. 42 Pa. C.S. § 9711(c)(1)(iv) ("The verdict must be a sentence of life imprisonment in all other cases."). The remaining sections dealing with life sentences either tell the jury to fill out the verdict form when it has reached a unanimous verdict, 42 Pa. C.S. § 9711(f), or set forth the mechanisms by which the court must impose that sentence, 42 Pa. C.S. § 9711(c)(1)(v) (lifelocked jury); 42 Pa. C.S. § 9711(g) (unanimous jury).

[20] If it were otherwise, a life verdict from a unanimous capital sentencing jury also would not survive reversal of a first-degree conviction.

sentence provided yet additional expectation of its finality, *cf. United States v. DiFrancesco*, 449 U.S. 117, 139 (1980) (where the legislature "has specifically provided that the sentence is subject to appeal . . . there can be no expectation of finality in the original sentence"), particularly in a legislative scheme in which the sentencing trial was a separate proceeding adjudicating the functional equivalent of a separate offense. *Ring v. Arizona*, 122 S. Ct. 2428, 2243 (2002).

Finally, Respondent contends that this Court's life and liberty interest cases recognize only transient procedural protections, and do not carry over to subsequent proceedings. But that is only because the violations presented to the Court thus far involve deprivations of the original process, so there is no favorable outcome to protect. *Evitts v. Lucey*, 469 U.S. 387 (1985) unquestionably would guarantee the future effective assistance of counsel that initially was denied. *Ford v. Wainwright*, 477 U.S. 399 (1986) guarantees notice and effective participation in future competency proceeding, and unquestionably protects the defendant's legitimate expectation in the enforcement of a favorable outcome. Thus, *Ford* guarantees that an individual adjudicated to be incompetent will not be executed while incompetent. Similarly, a person who received favorable consideration in Ohio's clemency proceedings, *Ohio Adult Parole Authority v. Woodward*, 477 U.S. 272 (1998), would have a protected interest in the enforcement and finality of any grant of clemency.

Pennsylvania created a constitutionally protected life and liberty interest in the finality of the life judgment statutorily mandated as a result of a lifelocked jury. That right vested when the court found the jury deadlocked and imposed a mandatory life sentence. Subjecting Petitioner

to a capital resentencing once that right has vested violated due process.

Respectfully submitted,

ROBERT BRETT DUNHAM
ANNE L. SAUNDERS
DEFENDER ASSOCIATION
OF PHILADELPHIA
Federal Court Division
Independence Square West
Suite 545 West,
The Curtis Center
Philadelphia, PA 19106
(215) 928-0520

JOHN T. ADAMS, ESQUIRE
LINTON, DISTASIO, ADAMS,
& PALANGE, P.C.
1720 Mineral Spring Road
P.O. Box 461
Reading, PA 19603-0461
(610) 374-7320

Counsel for Petitioner,
David Allen Sattazahn